UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
CIVIL MINUTES—GENERAL

Case No.	**EDCV 17-071 JGB (DTBx)**	Date	March 2, 2017
Title	***Moises Patron, Maria Pilar Patron v. Select Portfolio Servicing, Inc. et al.***		

Present: The Honorable	JESUS G. BERNAL, UNITED STATES DISTRICT JUDGE

MAYNOR GALVEZ	Not Reported
Deputy Clerk	Court Reporter
Attorney(s) Present for Plaintiff(s):	Attorney(s) Present for Defendant(s):
None Present	None Present

Proceedings: **(IN CHAMBERS) Order: (1) GRANTING IN PART and DENYING IN PART Defendants' Motion for Judgment on the Pleadings (Dkt. No. 10); and (2) GRANTING Defendants' Request for Judicial Notice (Dkt. No. 11.)**

Before the Court are: (1) Defendants' Motion for Judgment on the Pleadings (Dkt. No. 10); and (2) Defendants' Request for Judicial Notice. (Dkt. No. 11.) These matters are appropriate for resolution without a hearing. See Fed. R. Civ. P. 78; L.R. 7-15. After considering all papers timely filed in support of, and in opposition to the matters, the Court: (1) GRANTS IN PART and DENIES IN PART Defendants' Motion for Judgment on the Pleadings; and (2) GRANTS Defendants' Request for Judicial Notice. The March 6, 2017 hearing on the matters is VACATED.

I. BACKGROUND

A. Procedural History

On November 30, 2016, Moises Patron and Maria Pilar Patron ("Plaintiffs"), proceeding pro se, filed a Complaint against Select Portfolio Servicing, Inc. ("SPS"), NDEX, LLC ("NDEX"), U.S. Bank National Association, as trustee for Mastr Asset Backed Securities Trust 2006-WMC4, Mortgage Pass-Through Certificates, Series 2006-WMC4 ("U.S. Bank"), Mortgage Electronic Registration Systems, Inc. ("MERS") and Does 1 through 45 in Superior Court for the County of San Bernardino. ("Complaint," See Exhibit A to Notice of Removal, Dkt. No. 1-1.) Plaintiffs allege the following ten causes of action against Defendants: (1) negligence, (2) violation of California Business and Professions Code section 17200 ("UCL"), et seq., (3) violation of California's Homeowners Bill of Rights ("HBOR"), (4) cancellation of written instruments, (5) constructive fraud, (6) fraud in the concealment, (7) intentional infliction of emotional distress, (8) slander of title, (9) quiet title, and (10) declaratory relief. (Complaint.) Defendants filed their Answer to the Complaint on December 28, 2016. (Notice of Removal, Dkt. No. 1, ¶ 4.) On January 13, 2017, Defendants removed the action to this Court on the basis of diversity jurisdiction. (Id.) On February 2, 2017, SPS, U.S. Bank and MERS (collectively, "Defendants") filed a Motion for Judgment on the Pleadings as to all causes of action alleged in the Complaint. ("Motion," Dkt. No. 10.) In support of their Motion, Defendants filed a Request for Judicial Notice, requesting the Court take notice of the following documents:

- Notice of Default and Election to Sell Under Deed of Trust, recorded in the Official Records of San Bernardino County on February 23, 2009, as instrument number 2009-0076734 as Exhibit 1;
- Notice of Rescission of Notice of Default, recorded in the Official Records of San Bernardino County on December 14, 2009, as instrument number 2009-0553540 as Exhibit 2; and
- Excerpt from Pooling and Servicing Agreement available on the Security and Exchange Commission's website as Exhibit 3 ("RJN," Dkt. Nos. 11, 11-1, 11-2, 11-3.)[1]

On February 17, 2017, Plaintiffs filed their Opposition to Defendants' Motion. ("Opposition," Dkt. No. 12.)

B. Factual Allegations and Claims

The following facts are drawn from the Plaintiffs' Complaint and taken as true for purposes of this Motion. On July 3, 2006, Plaintiffs entered into a consumer credit transaction with WMC

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[1] Pursuant to Federal Rule of Evidence 201, "[a] court shall take judicial notice if requested by a party and supplied with the necessary information." Fed. R. Evid. 201(d). An adjudicative fact may be judicially noticed if it is "not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b). Defendants' request for judicial notice of public record documents relating to the mortgage loan and various interests in the subject property, including a publicly available excerpt of Defendants' Pooling and Service Agreement. The Court finds these documents are proper subjects for judicial notice. Indeed, courts routinely take judicial notice of these types of documents. See, e.g., Liebelt v. Quality Loan Serv. Corp., No. 09-CV-05867-LHK, 2011 WL 741056, at *6 n.2 (N.D. Cal. Feb. 24, 2011) (taking judicial notice of Trustee's Deed Upon Sale); Reynolds v. Applegate, No. C 10-04427 CRB, 2011 WL 560757, at *1 n.2 (N.D. Cal. Feb. 14, 2011) (taking judicial notice of various documents related to foreclosure, including Notice of Default); Reyn's Pasta Bella, LLC v. Visa USA, Inc., 442 F.3d 741, 746 n.6 (9th Cir. 2006) (taking judicial notice of briefs, transcripts, and various other court filings from related case). Accordingly, The Court GRANTS Defendants' Request for Judicial Notice. (Dkt. No. 11.)

Mortgage Corp. ("WMC") whereby Plaintiffs obtained a mortgage loan in the amount of $368,000.00, secured by the Deed of Trust ("DOT") on Plaintiffs' real property located at 11416 Bolero Drive, Fontana, California, 92337 (the "subject property"). (Complaint ¶ 27; "Deed of Trust," Dkt. No. 1-1, Ex. A at 39.) The Deed of Trust lists WMC as the lender or beneficiary, Westwood Associates Corp. ("Westwood") as the trustee, and MERS as the beneficiary's nominee.[2] (Deed of Trust.)

Plaintiffs allege that NDEX caused a Notice of Default ("NOD") to be recorded in the office of the County Recorder of San Bernardino County on February 19, 2009. (Complaint ¶ 28.) The NOD lists NDEX as the entity for Plaintiffs to contact regarding the NOD and attaches a declaration that the beneficiary or its authorized agent has complied with the requirements of section 2923.5 of the California Civil Code.[3] (Id. at ¶ 30.) Plaintiffs allege that the declaration was false because Defendants neither contacted Plaintiffs nor exercised due diligence in attempting to contact Plaintiffs as required by section 2923.5. (Id.) Plaintiffs allege the declaration is invalid on the additional basis that it was made by NDEX, a third party, that was neither a beneficiary nor an authorized agent of the beneficiary at the time the NOD was executed. (Id.; "Notice of Default and Election to Sell Under Deed of Trust," Dkt. No. 1-1, Ex. B.)

Plaintiffs allege that on March 18, 2009, U.S. Bank recorded a "Substitution of Trustee" ("Substitution" or "SOT") in the official records for San Bernardino County, substituting NDEX for the original trustee, Westwood. (Complaint ¶ 32; "Substitution of Trustee," Dkt. No. 1-1, Ex. C.) Plaintiffs maintain, however, that this substitution was invalid because "there is no valid power of attorney recorded as to this document,"—making the authority of the signer uncertain—and no certificate of mailing of the purported assignment was recorded contemporaneously or otherwise, as required under California Civil Code section 2934a. (Complaint ¶ 32.)

On March 26, 2009, MERS recorded an "Assignment of Deed of Trust" in the official records of San Bernardino County, which purports to convey and transfer all beneficial interest under the deed of trust to U.S. Bank. (Complaint at ¶ 35: "Assignment," Dkt. No. 1-1, Ex. D.) According to Plaintiffs, this Assignment was invalid because MERS had no standing or any legal authority to transfer Plaintiffs' interest in their real property. (Complaint ¶ 36.) On April 12, 2016, SPS allegedly executed a purported loan modification. ("Loan Modification," Dkt. No. 1-1, Ex. E.) Plaintiffs assert that the Loan Modification is invalid, however, because SPS had no standing or any legal authority to execute such modification under Plaintiffs' Note. (Complaint ¶ 38.) In addition to challenging the validity of the Loan Modification, Plaintiffs challenge the validity of the underlying debt. (Id.)

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[2] "The beneficiary of this Security Instrument is MERS (solely as nominee for Lender and Lender's successors and assigns) and the successors and assigns of MERS." (Deed of Trust at 2.)

[3] Section 2923.5 of the California Civil Code requires a party issuing a NOD to contact the borrower to discuss certain mandatory matters as prescribed by that section.

In effect, Plaintiffs allege that each Defendant "cannot show proper receipt, possession, transfer, negotiations, assignment and ownership of the borrower's original Promissory Note and Deed of Trust, resulting in imperfect security interests and claims." (Complaint ¶ 39, 40.) As a result, Plaintiffs allege that none of the Defendants have perfected any claim of title or security interest in the subject property and all of the Defendants are without the ability to establish the mortgages that secure the indebtedness, or Note, were legally or properly acquired. (Id.)

Plaintiffs seek a judicial determination of their rights with regard to the subject property and the corresponding Promissory Note and Deed of Trust. (Id. at ¶ 41.) Plaintiffs also seek compensatory damages, injunctive relief, and cancellation of written instruments based on: an unperfected security interest in Plaintiffs' real property, a void "True Sale" violating California foreclosure laws and the HBOR, and an incomplete an ineffectual perfection of a security interest in Plaintiffs' real property. (Id. at ¶ 42.) Plaintiffs also allege that the Deed of Trust executed by Plaintiffs in favor of the original lender was not properly assigned or transferred to Defendants operating the pooled mortgage funds or trusts in accordance with the Pooling Service Agreement ("PSA") and California law. (Id. at ¶ 43.)

II. LEGAL STANDARD

Judgment on the pleadings is proper if the moving party "clearly establishes on the face of the pleadings that no material issue of fact remains to be resolved and that [the moving party] is entitled to judgment as a matter of law." Hal Roach Studios v. Richard Feiner and Co., Inc., 896 F.2d 1542, 1550 (9th Cir. 1989); see also Enron Oil Trading & Transp. Co. v. Walbrook Ins. Co., 132 F.3d 526, 528 (9th Cir. 1997). Alternatively, the Court has discretion to grant leave to amend and may dismiss causes of action rather than grant judgment on a Rule 12(c) motion. See Lonberg v. City of Riverside, 300 F. Supp. 2d 942, 945 (C.D. Cal. 2004); Carmen v. San Francisco Unified School Dist., 982 F. Supp. 1396, 1401 (N.D. Cal. 1997).

Under Rule 12(c) of the Federal Rules of Civil Procedure, a motion for judgment on the pleadings is appropriate "[a]fter the pleadings are closed." The "pleadings are closed for the purposes of Rule 12(c) once a complaint and answer have been filed, assuming ... that no counterclaim or cross-claim is made." Doe v. United States, 419 F.3d 1058, 1061 (9th Cir. 2005). As a general rule, the Court may not consider material beyond the pleadings without converting the motion to a motion for summary judgment. See Fed. R. Civ. P. 12(c); Heliotrope General, Inc. v. Ford Motor Co., 189 F.3d 971, 979-80 (9th Cir. 1999); Qwest Communications Corp.v. City of Berkeley, 208 F.R.D. 288, 291 (N.D. Cal. 2002). Where the motion for judgment on the pleadings raises the defense of failure to state a claim, the motion is governed by the standards used to assess the sufficiency of the complaint under Rule 12(b)(6) of the Federal Rules of Civil Procedure. McGlinchy v. Shell Chemical Co., 845 F.2d 802, 810 (9th Cir. 1988).

Federal Rule of Civil Procedure 12(b)(6) allows a party to bring a motion to dismiss for failure to state a claim upon which relief can be granted. Rule 12(b)(6) is read in conjunction with Rule 8(a), which requires only a short and plain statement of the claim showing that the pleader is entitled to relief. Fed. R. Civ. P. 8(a)(2); Conley v. Gibson, 355 U.S. 41, 47 (1957) (holding that the Federal Rules require that a plaintiff provide "'a short and plain statement of the claim' that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests") (quoting Fed. R. Civ. P. 8(a)(2)); Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007). When evaluating a Rule 12(b)(6) motion, a court must accept all material allegations in the complaint—as well as any reasonable inferences to be drawn from them—as true and construe them in the light most favorable to the non-moving party. See Doe v. United States, 419 F.3d 1058, 1062 (9th Cir. 2005); ARC Ecology v. U.S. Dep't of Air Force, 411 F.3d 1092, 1096 (9th Cir. 2005); Moyo v. Gomez, 32 F.3d 1382, 1384 (9th Cir. 1994)."While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the 'grounds' of his 'entitlement to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." Twombly, 550 U.S. at 555 (citations omitted). Rather, the allegations in the complaint "must be enough to raise a right to relief above the speculative level." Id.

Surviving a motion to dismiss requires a plaintiff to allege "enough facts to state a claim to relief that is plausible on its face." Twombly, 550 U.S. at 570; Ashcroft v. Iqbal, 556 U.S. 662, 697 (2009). "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully. Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it stops short of the line between possibility and plausibility of 'entitlement to relief.'" Iqbal, 556 U.S. at 678 (quoting Twombly, 550 U.S. at 556). The Ninth Circuit has clarified that (1) a complaint must "contain sufficient allegations of underlying facts to give fair notice and to enable the opposing party to defend itself effectively," and (2) "the factual allegations that are taken as true must plausibly suggest an entitlement to relief, such that it is not unfair to require the opposing party to be subjected to the expense of discovery and continued litigation." Starr v. Baca, 652 F.3d 1202, 1216 (9th Cir. 2011).

Rule 9(b) presents heightened pleading requirements for plaintiffs alleging fraud or mistake. In alleging fraud or mistake, the plaintiff must "state with particularity the circumstances constituting fraud or mistake." Fed. R. Civ. P. 9(b). Failure to satisfy this heightened pleading requirement can result in dismissal of the claim. Vess v. Ciba-Geigy Corp. USA, 317 F.3d 1097, 1107 (9th Cir. 2003). In general, the plaintiff's allegations of fraud or mistake must be "specific enough to give defendants notice of the particular misconduct . . . so that they can defend against the charge and not just deny that they have done anything wrong." Id. at 1106; Swartz v. KPMG LLP, 476 F.3d 756 (9th Cir. 2007)("In the context of a fraud suit involving multiple defendants, a plaintiff must, at a minimum, identify the role of each defendant in the alleged fraudulent scheme to satisfy the fraud pleading rule."). This heightened pleading standard requires the plaintiff to allege fraud or mistake by detailing "the who, what, when, where, and how" of the misconduct charged. Id. at 1106-07. In other words, the plaintiff must specify the time, place, and content of the alleged fraudulent or mistaken misconduct. See Id.

Although the scope of review on a Rule 12(b)(6) motion to dismiss is limited to the contents of the complaint, the Court may consider certain materials, such as documents attached to the complaint, documents incorporated by reference in the complaint, or matters of judicial notice. United States v. Ritchie, 342 F.3d 903, 907-08 (9th Cir. 2003). Under the incorporation by reference doctrine, the Court may consider documents not attached to the pleading if: (1) those documents are referenced extensively in the complaint or form the basis of the plaintiff's claim; and (2) if no party questions their authenticity. Knievel v. ESPN, 393 F.3d 1068, 1076 (9th Cir. 2005).

III. DISCUSSION

A. Negligence

Defendants argue that Plaintiffs' negligence claim, which has a two-year statute of limitations, is time-barred as it is based primarily on the Substitution, Notice of Default, and Assignment, which were all recorded in 2009. (Mot. at 15.) In so doing, Defendants maintain that Plaintiffs' contention that the statute of limitations should be tolled based on Defendants' concealment of material facts is insufficiently alleged. (Id.) In addition, Defendants argue that Plaintiffs cannot state a negligence claim because: (a) Plaintiffs fail to sufficiently allege that Defendants exceeded the traditional role of a mere lender, (b) Defendants did not owe Plaintiffs a duty of care in the negotiation of a loan modification, and (c) any claims premised on Defendants' failure to comply with the terms of the DOT are barred by the economic loss rule. (Mot. at 16.)[4] Lastly, Defendants assert that even if Plaintiffs could adequately allege duty and breach, they cannot allege damages since "there are no pending foreclosure proceedings against the Property and Plaintiffs remain in possession of the Property." (Mot. at 16.)

To state a claim for negligence, a plaintiff must allege: (1) the defendant's legal duty of care to the plaintiff; (2) breach of that duty; (3) causation; and (4) resulting injury to the plaintiff. Merrill v. Navegar, Inc., 26 Cal. 4th 465, 500 (2001). "The legal duty of care may be of two general types: (a) the duty of a person to use ordinary care in activities from which harm might reasonably be anticipated, or (b) an affirmative duty where the person occupies a particular relationship to others." McGettigan v. Bay Area Rapid Transit Dist., 57 Cal. App. 4th 1011, 1016–1017 (1997). "The existence of a legal duty to use reasonable care in a particular factual situation is a question of law for the court to decide." Vasquez v. Residential Invs., Inc., 118 Cal. App. 4th 269, 278 (2004).

Under California law, a financial institution generally owes no duty of care to a borrower when the institution's involvement in the loan transaction does not exceed the scope of its conventional role as a mere lender of money. Nymark v. Heart Fed. Sav. & Loan Ass'n, 231 Cal. App. 3d 1089, 1095–1096 (1991). The test for determining whether a financial institution exceeded its role as money lender and thus owes a duty of care to a borrower involves "the balancing of various factors, among which are (1) the extent to which the transaction was intended to affect the plaintiff, (2) the foreseeability of harm to him, (3) the degree of certainty that the plaintiff suffered injury, (4) the closeness of the connection between the defendant's conduct and the injury suffered, (5) the moral blame attached to the defendant's conduct, and (6)

[4] Defendants separately argue that any negligence claim premised on noncompliance with the Deed of Trust is unavailable as against MERS because MERS's obligations only ran to WMC and its successors and assigns. (Mot. at 16.)

the policy of preventing future harm." Id. at 1098. Some courts in this circuit have concluded that once a lender accepts an application for a loan modification, it has exceeded its role as money lender. See Garcia v. Ocwen Loan Servicing, LLC, 2010 WL 1881098, at *3 (N.D. Cal. May 10, 2010); Trant v. Wells Fargo Bank, N.A., 2012 WL 2871642, at *6–*7 (S.D. Cal. July 12, 2012); Ansanelli v. JP Morgan Chase Bank, N.A., 2011 WL 1134451, at *7 (N.D. Cal. Mar. 28, 2011); Avila v. Wells Fargo Bank, 2012 WL 2953117, at *12–*14 (N.D. Cal. July 19, 2012); Chancellor v. OneWest Bank, 2012 WL 1868750, at *13–*14 (N.D. Cal. May 22, 2012).

Plaintiffs allege that Defendants "had a duty to exercise reasonable care and skill to maintain proper and accurate loan records and to discharge and fulfill the other incidents attendant to the maintenance, accounting and servicing of loan records." (Complaint ¶ 57.) Plaintiffs allege Defendants breached this duty by: (a) failing to disclose to Plaintiffs the status of any foreclosure actions taken and who owned Plaintiffs' Loan, and (b) taking actions against Plaintiffs that Defendants did not have the legal authority to do. (Id.) Specifically, Plaintiffs allege that Defendants breached their duty of care and skill to Plaintiffs in the "servicing of Plaintiffs' loans" by violating the statutory procedures applicable to foreclosures in California, preparing and recording false documents, and foreclosing on the Subject Property without having the legal authority and/or proper documentation to do so. In addition, Plaintiffs allege that Defendants were negligent in failing to properly supervise and train their agents and employees with respect to the legal execution and recordation of foreclosure documents. (Id. at ¶ 60.)

NDEX did not owe Plaintiffs a duty of reasonable care under negligence as a trustee under the DOT. See Morgan v. U.S. Bank Nat. Ass'n, No. C 12-03827 CRB, 2013 WL 684932, at *3 (N.D. Cal. Feb. 25, 2013) (finding that allegations that "[t]rustee owed a duty of care to discharge its contractual duties ... with reasonable care" and "[s]ervicer owed [p]laintiff an additional fiduciary duty to properly collect payments, distribute payments, debit the [p]laintiff's accounts and credit the [p]laintiff's accounts" did not state a negligence claim against a trustee as a matter of law); Barrionuevo v. Chase Bank, N.A., 885 F. Supp. 2d 964, 972 (N.D. Cal. 2012) ("The trustee in nonjudicial foreclosure is not a true trustee with fiduciary duties, but rather a common agent for the trustor and beneficiary.") (citing Kachlon v. Markowitz, 168 Cal. App. 4th 316, 334 (2008) (internal citations omitted).

Similarly, neither MERS nor U.S. Bank owed a duty of care to Plaintiffs in servicing the loan or in acting as a lender within the scope of their traditional lender roles. Bascos v. Fed. Home Loan Mortg. Corp., No. CV 11-3968-JFW JCX, 2011 WL 3157063, at *7 (C.D. Cal. July 22, 2011) (dismissing negligence claim against trustee for defect in NOD because "a trustee under a deed of trust owes Plaintiff no duty beyond its duties contained in Cal. Civ.Code §§ 2924, et seq."). Since SPS is alleged to have executed a false loan modification, SPS is the only Defendant that can be inferred to have any duty of care to Plaintiffs for purposes of their negligence claim. (See Loan Modification.) While the Court can infer that SPS was not involved in the loan's origination, Plaintiffs do not sufficiently allege that SPS's actions were outside the scope of the role of a traditional lender in servicing the loan or outside the scope of what may be required of a trustee acting for the benefit of the Loan's beneficiary. See Rockridge Trust v. Wells Fargo, N.A., 985 F. Supp. 2d 1110, 1162 (N.D. Cal. 2013) (dismissing negligence claim with prejudice because plaintiffs did not allege facts "indicating that Wells Fargo or Bank of America, the only Defendants evidently engaged in the modification process, exceeded their typical role as a lender of money.").

Plaintiffs' allegations premised on Defendants' failure to train are insufficient because they are irrelevant to the determination of whether Defendants exceeded their roles as traditional lenders. Accordingly, Defendants' Motion is GRANTED and Plaintiffs' negligence claim is DISMISSED WITH LEAVE TO AMEND.

B. California Civil Code Section 2923

Defendants argue that Plaintiffs' claim under California Civil Code section 2923.5 ("Section 2923.5") fails because it is time-barred, and under the law applicable at the time of the NOD, Defendants were not required to actually contact Plaintiffs—rather, the applicable law at the time only required loan servicers to act with due diligence to contact a borrower. (Mot. at 20.) As such, Defendants maintain that "[n]one of the allegations in the Complaint establish that Chase Home Finance, LLC, the former servicer of the Loan, did not satisfy these due diligence alternatives." (Id.) In addition, Defendants maintain that neither SPS nor MERS acted as servicers of the Loan at the time the NOD was recorded so they cannot be liable for violating Section 2923.5. (Id.) Lastly, since the NOD was rescinded, Defendants contend that Plaintiffs' claim under Section 2923.5 is moot. (Id.)

Plaintiffs allege that Defendants violated Section 2923.5 by failing to comply with the express requirements for Pre-Notice of Default Outreach mandated by the HBOR. (Complaint ¶ 76.) In particular, Plaintiffs allege that prior to filing the NOD and instituting the nonjudicial foreclosure of the subject property, "the foreclosing defendants did not contact Plaintiff to discuss alternatives to foreclosure." (Id. at ¶ 78.) Moreover, Plaintiffs maintain that contrary to Defendants' declaration, prior to recording the NOD, "neither the Loan Servicer nor the Lender contacted Plaintiff in person or by telephone in order to assess Plaintiffs' financial situation and explore options for Plaintiffs to avoid foreclosure." (Id. at ¶ 79.) Plaintiffs seek to enjoin any future foreclosure based on any NOD or SOT recorded on the subject property "based upon a fraudulent and forged Deed of Trust." (Id. at ¶ 81.) Plaintiffs alternatively argue that Defendants have failed to comply with the procedural requirements imposed by California Civil Code sections 2924 through 2924l. (See Complaint ¶ 81) ("Plaintiff contends that, Civil Code § 2924.1 authorizes actions to enjoin foreclosures, or for damages after foreclosure, for breaches of § §2923.55 or 2924.17.").

California Civil Code section 2924.17 requires that notices of default and notices of sale recorded in connection with a foreclosure proceeding "shall be accurate and complete and supported by competent and reliable evidence." Cal. Civ. Code § 2924.17(a). Civil Code section 2924.17 also requires that prior to recording or filing such documents, a mortgage servicer "shall ensure that it has reviewed competent and reliable evidence to substantiate the borrower's default and the right to foreclose, including the borrower's loan status and loan information." Cal. Civ. Code § 2924.17(b). If a foreclosure sale has not occurred, and no trustee's deed upon sale has been recorded, a borrower may only bring an action for injunctive relief to enjoin a violation of Civil Code section 2924.17. See Cal. Civ. Code § 2924.12(a)(1). Only when a trustee's deed upon sale has been recorded may a borrower seek economic damages for a violation of Civil Code section 2924.17. See Cal. Civ. Code § 2924.12(b); see also Valbuena v. Ocwen Loan Servicing, LLC, 237 Cal. App. 4th 1267, 1272 (2015) ("HBOR provides for injunctive relief for statutory violations that occur prior to foreclosure ... and monetary damages when the borrower seeks relief for violations after the foreclosure sale has occurred.").

Since the HBOR lacks retroactive effect, Defendants were not subject to the HBOR's Pre-Notice of Default requirements when the NOD was recorded in 2009. Rockridge Trust v. Wells Fargo, N.A., 985 F. Supp. 2d 1110 (N.D. Cal. 2013). The applicable version of Section 2923.5 provides that a party seeking to foreclose cannot file a notice of default until thirty days after contacting the borrower in person or by telephone to assess the borrower's financial situations, or after satisfying the due diligence requirement to contact the borrower. Martinez v. Am.'s Wholesale Lender, No. C 09-05630 WHA, 2010 WL 934617, at *4 (N.D. Cal. Mar. 15, 2010). While Section 2923.5 creates a private right of action, the right of action is limited to obtaining a postponement of an impending foreclosure to permit the lender to comply with section 2923.5. Mabry v. Superior Court, 185 Cal. App. 4th 208, 214 (2010). Where no foreclosure sale has taken place, a borrower's claim for wrongful foreclosure is premature, notwithstanding the fact that the lender may have posted a NOD. Rosenfeld v. JPMorgan Chase Bank, N.A., 732 F. Supp. 2d 952 (N.D. Cal. 2010). Where a foreclosure sale has already taken place, the lender or foreclosure trustee may only be liable to the mortgagor or trustor for wrongful foreclosure if the property was fraudulently or illegally sold under the mortgage or deed of trust. Rosenfeld v. JPMorgan Chase Bank, N.A., 732 F. Supp. 2d 952 (N.D. Cal. 2010).

Here, Plaintiffs adequately allege that Defendants violated Section 2923.5 in failing to exercise due diligence in attempting to contact Plaintiffs prior to recording the NOD. Plaintiffs allege that the servicer and foreclosing Defendants did not exercise due diligence to contact Plaintiffs as required under Section 2923.5. (Complaint ¶ 82.) Plaintiffs also allege violations of Civil Code section 2924.14 in that Defendants allowed for accounting errors to inflate Plaintiffs' indebtedness to commence foreclosure proceedings on the subject property. (Id. at ¶ 92) ("[T]he Foreclosing Defendants failed to properly credit payments made and foreclosed on the Subject Property based on Plaintiffs' alleged non-payment.") However, Plaintiffs do not sufficiently allege why this violation is actionable under Section 2923.5. Plaintiffs contend that "any trustee's deed upon sale which has already been recorded is a material violation that has not been corrected." (Complaint ¶ 80.) As discussed, however, prior to the passage of the HBOR, courts held that the remedy for a § 2923.5 violation is limited to postponement of the foreclosure sale to allow compliance. Mabry v. Superior Court, 185 Cal. App. 4th 208, 223 (2010). Indeed, Section 2923.5 does not create a right to a loan modification, nor does it have any effect on a completed foreclosure sale. Lucioni v. Bank of Am., N.A., 3 Cal. App. 5th 150, 158 (2016), review denied (Nov. 30, 2016). It is unclear from the allegations contained in the Complaint whether a foreclosure sale is imminent or whether a foreclosure sale occurred. (See, e.g., Complaint ¶ 143) ("Said actions have resulted in the wrongful foreclosure of the Subject Property.").

Based on the allegations contained in the Complaint, the Court cannot infer what relief Plaintiffs request. Indeed, it is not clear from the Complaint that there are any foreclosure proceedings pending since the NOD appears to have been rescinded. While the Court must take Plaintiffs' allegations as true, the Complaint contains contradictory allegations as to what actually happened as a result of the NOD or any of the purportedly invalid foreclosure documents. Taking the allegations as true, Plaintiffs adequately plead statutory violations. Plaintiffs do not, however, consistently allege the damage they suffered as a result. Indeed, even if there were a violation, Plaintiffs already received the only reasonably inferable remedy available because the foreclosure sale contemplated by the NOD appears to have been postponed. (Notice of Rescission.) While Plaintiffs are correct to note "that under Ortiz [supra], Plaintiff[s] can bring an action to set aside the trustee's sale for Defendants' failure to comply with the express requirements of Civil Code 2923.5," the Court cannot discern which trustee's sale Plaintiffs seek to have set aside. (Opp. at 16.) While the pleadings do not convince the Court that Defendants are entitled to judgment as a matter of law, the claims are insufficiently alleged for Plaintiffs' right to relief to rise above a mere speculative level.

Accordingly, the Court GRANTS Defendants' Motion for Judgment on the Pleadings as to Plaintiffs' cause of action premised on violations of Section 2923.5. However, in recognition of Plaintiffs' pro se status, the Court GRANTS Plaintiffs leave to amend, directing Plaintiffs to identify: (1) whether a trustee's sale occurred or whether a foreclosure sale is pending, and (2) the circumstances that prevented them from discovering the wrongdoing and the Notice of Default until 2016.[5]

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[5] Defendants are correct that a three-year statute of limitations applies. In California, the time to bring an action upon a liability created by statute is three years. See, e.g., Ambers v. Wells Fargo Bank, N.A., No. 13-CV-03940 NC, 2014 WL 883752, at *10 (N.D. Cal. Mar. 3, 2014) (citing to Cal. Civ. Proc. Code § 338(a) and holding that plaintiff's claims under § 2923.5 was time-barred); Davis v. U.S. Bancorp, No. 5:15-CV-02337-PSG, 2015 WL 5676022, at *2 (N.D. Cal. Sept. 28, 2015) (plaintiff's claim that defendant failed to contact him regarding foreclosure alternatives before recording notice of default was time-barred under three-year statute of limitation). Since the NOD was recorded in 2009, Plaintiffs should have brought their claim under Section 2923.5 by 2012. Plaintiffs, however, allege that the statutes of limitations have been tolled "by the Defendants' continuing, knowing, and active concealment of the facts alleged herein." (Opp. at 7.) Plaintiffs, on the other hand, maintain that "[d]espite exercising reasonable diligence, Plaintiffs could not have discovered, did not discover, and w[ere] prevented from discovering, the wrongdoing and the Assignment of Deed of Trust complained of herein until the year 2016." (Id.) (emphasis omitted.) If Plaintiffs intend to rely on the discovery rule to toll the statute of limitations, they must allege why the NOD recorded in 2009 did not provide them with notice of the wrongdoing they claim has injured them. Fox v. Ethicon Endo-Surgery, Inc., 35 Cal. 4th 797, 807 (2005). Here, the NOD recorded on February 19, 2009 should have alerted Plaintiffs that Defendants actions may have harmed their credit standing or clouded the title to their property. Absent more allegations of why Plaintiffs did not seek relief earlier, the Court cannot infer that the statutes of limitations would necessarily be tolled for Plaintiffs' claims.

C. Cancellation of Written Instruments

The Court may order cancellation of an invalid written instrument that is void or voidable. Compass Bank v. Petersen, 886 F. Supp. 2d 1186, 1194 (C.D. Cal. 2012) (citing Cal. Civ. Code § 3412). Plaintiffs allege that "[i]f the wrongfully recorded SOT1, SOT2, NOD, and [Notice of Trustee's Sale] instruments are left outstanding, Plaintiffs will continue to suffer loss and damages." (Complaint ¶ 87.) Defendants argue that to the extent that Plaintiffs support their cancellation of written instruments claim on Defendants' failure to record U.S. Bank's power of attorney, it must fail because "the substitution was valid as long as U.S. Bank qualified as a beneficiary." (Mot. at 22.) In Defendants' view, since the beneficial interest under the Deed of Trust followed the transfer of the Note, Plaintiffs were required to allege that "the Note was not transferred to U.S. Bank in any manner," which Defendants assert they have not. (Id.) As with the other claims, Defendants contend that Plaintiffs' claim to cancel the written instruments is time-barred and moot due to the rescission of the NOD. (Id.)

Plaintiffs allege that the NOD, Substitution, Assignment, and Loan Modification are all void documents because none of the executing parties had the legal authority or proper documentation to transfer, assign, convey, or otherwise assert a claim or right in the subject property. (See, e.g., Complaint ¶ 58); (Id. at ¶¶ 60, 65, 88, 117, 133, 147.)

A deed of trust to real property acting as security for a loan typically has three parties: the trustor (borrower), the beneficiary (lender), and the trustee. Yvanova v. New Century Mortg. Corp., 62 Cal. 4th 919, 927 (2016). "The trustee holds a power of sale. If the debtor defaults on the loan, the beneficiary may demand that the trustee conduct a nonjudicial foreclosure sale." Biancalana v. T.D. Service Co., 56 Cal.4th 807, 813 (2013). The trustee starts the nonjudicial foreclosure process by recording a notice of default and election to sell. Cal. Civ .Code § 2924, subd. (a)(1). After a three-month waiting period, and at least 20 days before the scheduled sale, the trustee may publish, post, and record a notice of sale. §§ 2924, subd. (a)(2), 2924f, subd. (b).

Pursuant to Cal. Civ.Code § 2924(a)(1), "[t]he trustee, mortgagee, or beneficiary, or any of their authorized agents" may file a Notice of Default. Here, the judicially noticeable documents as well as the documents the Complaint incorporates by reference establish that the original Deed of Trust was executed between the Patrons (borrowers) and WMC (lender and beneficiary). (Deed of Trust). The DOT named MERS as the "nominee" and Westwood as the trustee. (Id.) As such, MERS and Westwood would be the parties authorized to commence foreclosure proceedings—including recording the NOD—between July 3, 2006 and March 18, 2009. (DOT; SOT.) As MERS was designated as the "nominee" for the "Lender" and "Lender's successors and assigns" under the Deed of Trust, MERS is an authorized agent of the Lender and has the authority to transfer, assign, convey, or otherwise dispense with the property as a beneficiary could in accordance with the the DOT.

The Assignment dated March 26, 2009, conveyed MERS's beneficial interest in Plaintiffs' property and DOT to U.S. Bank. (Assignment.) Absent from the Complaint are any allegations that allow for the reasonable inference that the Assignment was void. Plaintiff explicitly agreed, by executing the Deed of Trust, that MERS has the authority to foreclose and sell the Subject Property. The Deed of Trust provides:

> Borrower understands and agrees that MERS holds only legal title to the interests granted by Borrower in this Security Instrument, but, if necessary to comply with law or custom, MERS (as nominee for Lender and Lender's assigns) has the right: to exercise any or all of those interests, including, but not limited to, the right to foreclose and sell the Property, and to take any action required of Lender including, but not limited to, releasing and canceling this Security Instrument.

(Deed of Trust at 3.) Accordingly, since MERS executed the purported Assignment and had the authority to do so under the DOT, Plaintiffs' claim for cancellation of written instruments as to the Assignment is insufficiently alleged.

That said, the Court finds Plaintiffs' allegations sufficient to state a claim for cancellation of the NOD because the NOD was executed by NDEX, who was not MERS's trustee on February 19, 2009. Since the Substitution of Trustee—substituting NDEX for Westwood—was executed on March 18, 2009, any documents executed by NDEX prior to that date would be invalid. Still, a judicially noticeable document shows that the actionable NOD has since been rescinded. (Notice of Rescission.) Plaintiffs, therefore, cannot state a claim for cancellation of written instruments based on the defect in the NOD absent allegations that the recordation of the NOD renders subsequent instruments void or voidable. While Plaintiffs' claim to cancel the NOD would otherwise be moot, it is reasonable to infer that the purported Loan Modification may have contained errors that overstated the amount due on the loan. (See Complaint ¶¶ 90-91)("The Foreclosing Defendants also utilized amount known to the Defendants to be inaccurate to determine the amount allegedly due . . .[and] the Foreclosing Defendants failed to properly credit payments made and foreclosed on the Subject Property . . .").

Indeed, Plaintiffs allege that the Loan Modification executed by SPS on April 12, 2016 is invalid and has no force and effect because SPS had no legal authority to execute a Loan Modification. (Opp. at 7-8.) While the Complaint leaves unclear how or why this Loan Modification came into existence, Plaintiffs do allege that the Notice of Trustee Sale "fails to properly credit Plaintiff[s] for the payments made under the written loan agreement and therefore overstates the amount of Plaintiffs' default." (Id. at 8.) Drawing all reasonable inferences in Plaintiffs' favor, it is plausible that the purported Loan Modification is invalid due to Defendants' failure to correct errors relating to Plaintiffs' loan payments.

Accordingly, Plaintiffs sufficiently allege that the Loan Modification is void or voidable due to a defect either in the NOD or because SPS was not U.S. Bank's authorized agent. Plaintiffs, therefore, state a claim for cancellation of the Loan Modification agreement. However, they do not state an independent claim for cancellation of the NOD, Substitution, or Assignment. Accordingly, the Court GRANTS Defendants' Motion to Dismiss Plaintiffs' claims to cancel the NOD, Substitution, and Assignment, and DENIES Defendants' Motion to Dismiss Plaintiffs' claim to cancel the Loan Modification. Plaintiffs' cancellation of written instrument claims are DISMISSED WITH LEAVE TO AMEND as to the NOD, Substitution, and Assignment.

D. Fraud Claims

Defendants argue that Plaintiffs fail to adequately allege all of the elements to state their fraud claims. (Mot. at 23.) In particular, Defendants assert that the Complaint fails to allege that Defendants undertook a duty to act primarily for the benefit of Plaintiffs with respect to the loan. (Id. at 24.) As such, Defendants maintain that they were under no duty to disclose the potential securitization of the Loan to Plaintiffs. (Id.) Moreover, even if there were such a duty, Defendants contend that this duty was satisfied because the Deed of Trust contains an express disclaimer that the Note or a partial interest in the Note may be sold one or more times without prior notice to Plaintiffs. (Id.) Plaintiffs, therefore, cannot establish that they were unaware of this fact. (Id.) Defendants also argue that because their purported failure to credit the loan payments is more appropriately recoverable under a breach of contract claim, "Plaintiffs' fraud-related claims are barred by the economic loss rule." (Id. at 26.) Lastly, Defendants assert that since Plaintiffs fail to sufficiently allege that any representations made to them were false, they cannot allege that Defendants had knowledge of such falsity, that Defendants intended to defraud Plaintiffs, or that they justifiably relied on such representations to their detriment. (Id.)

Under California law, the tort of fraud requires a misrepresentation, knowledge of falsity, intent to induce reliance, reliance, causation and resulting damage. See, e.g., Robinson Helicopter Co. v. Dana Corp., 34 Cal. 4th 979, 990 (2004); see also 5 Witkin, Cal. Procedure (5th ed. 2008) Pleading, § 710, p. 125 ("The essential allegations of a cause of action of deceit are: representation, falsity, knowledge of falsity, intent to deceive, and reliance and resulting damage (causation)"). California courts have cautioned that if the defrauded plaintiff would have suffered the alleged damage even in the absence of the fraudulent inducement, causation cannot be alleged and a fraud cause of action cannot be sustained. Beckwith v. Dahl, 205 Cal. App. 4th 1039, 1064 (2012).

Plaintiffs alleging claims for fraud or mistake "must state with particularity the circumstances constituting fraud or mistake." Fed. R. Civ. P. 9(b). The particularity requirement applies to state-law claims and to claims grounded in fraud regardless of whether fraud is an essential element of the claim. Vess v. Ciba-Geigy Corp. USA, 317 F.3d 1097, 1103 (9th Cir. 2003). "Where a fraudulent omission is at issue, the requirements of Rule 9(b) are relaxed, but not eliminated." UMG Recordings, Inc. v. Glob. Eagle Entm't, Inc., 117 F. Supp. 3d 1092, 1107 (C.D. Cal. 2015) (citation omitted).

When a plaintiff accuses multiple defendants of fraud, she "must provide each and every defendant with enough information to enable them 'to know what misrepresentations are attributable to them and what fraudulent conduct they are charged with.' " Pegasus Holdings v. Veterinary Centers of America, Inc., 38 F. Supp. 2d 1158, 1163 (C.D. Cal. 1998) (quoting In re Worlds of Wonder Sec. Litig., 694 F. Supp. 1427, 1433 (N.D. Cal. 1988)). "Rule 9(b) does not allow a complaint to merely lump multiple defendants together but 'require[s] plaintiffs to differentiate their allegations when suing more than one defendant ... and inform each defendant separately of the allegations surrounding his alleged participation in the fraud.' " Swartz v. KPMG LLP, 476 F.3d 756, 764–765 (9th Cir. 2007) (quoting Haskin v. R.J. Reynolds Tobacco Co., 995 F.Supp. 1437, 1439 (M.D.Fla.1998)). "In the context of a fraud suit involving multiple defendants, a plaintiff must, at a minimum, 'identif[y] the role of [each] defendant[ ] in the alleged fraudulent scheme.' " Moore v. Kayport Package Express, Inc., 885 F.2d 531, 541 (9th Cir.1989).

Plaintiffs allege that the foreclosing Defendants "engaged in a pattern and practice of defrauding Plaintiffs in that, during the life of the mortgage loan, the Foreclosing Defendants failed to properly credit payments made and foreclosed on the subject property based on Plaintiffs' alleged non-payment which they knew to be false." (Complaint ¶ 92.) Plaintiffs further allege that Defendants "had actual knowledge that the Plaintiffs' account was not accurate" but "use[d] the inaccuracy to foreclose on the Subject Property which had substantial equity to recover its excessive fees charges and interest." (Id. at ¶ 90.) Plaintiffs also allege they made such payments based on the improper inaccurate and fraudulent representations as to their account. (Id.) As to fraud by concealment, Plaintiffs allege that Defendants' concealed material facts "regarding payments notices assignments transfers late fees and charges with the intent to defraud Plaintiffs intending to induce Plaintiffs reliance which the unsuspecting Plaintiffs justifiably relied upon resulting in damage to their credit standing costs and loss of their property." (Id. at ¶ 92.) As to reliance, Plaintiffs maintain they were unaware of the true facts and had they known of such facts, they "would not have maintained the Foreclosing Defendants as their lender, servicer and trustee," and "would have taken legal action immediately to save [their] real property." (Id.)

Plaintiffs allege all of the elements of fraud. Plaintiffs do not, however, allege damages that the Court may plausibly infer resulted from conduct that is sufficiently alleged. In other words, Plaintiffs fail to allege their fraud claims with the requisite particularity to put Defendants on notice of the particular misconduct in which each Defendant is alleged to have participated under Rule 9(b). None of the allegations give notice of who made each misrepresentation, when the misrepresentations were made, or the precise content of such representations. Since the supporting factual allegations lack the necessary specificity under Rule 9(b), Defendants' Motion for judgment on the pleadings is GRANTED as to Plaintiffs' fraud claims. That said, Plaintiffs are given LEAVE TO AMEND their fraud claims and are directed to specifically allege: (1) whether the subject property was actually foreclosed upon, (2) when Plaintiffs were put on notice that their account was not accurate and how they became aware of such inaccuracies, (3) which Defendant sent/posted or executed which purportedly inaccurate document, (4) the time at which Plaintiffs were charged excessive fees and how this purported imposition of fees was caused by a specific misrepresentation made by Defendants, and (5) the amount Plaintiffs allege they paid to Defendants which was not properly credited.

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E. Intentional Infliction of Emotional Distress

Defendants argue that Plaintiffs' claim is time-barred and insufficiently alleged because the Complaint fails to allege any extreme or outrageous conduct by Defendants. (Mot. at 27.), Defendants maintain that commencing a nonjudicial foreclosure neither arises to extreme or outrageous conduct nor is alleged to have occurred at all. (Id.)

The tort of intentional infliction of emotional distress is comprised of three elements: (1) extreme and outrageous conduct by the defendant with the intention of causing, or reckless disregard of the probability of causing, emotional distress; (2) the plaintiff suffered severe or extreme emotional distress; and (3) the plaintiff's injuries were actually and proximately caused by the defendant's outrageous conduct. KOVR–TV, Inc. v. Superior Court, 31 Cal. App. 4th 1023, 1028 (1995). In evaluating whether the defendant's conduct was outrageous, it is "not enough that the defendant has acted with an intent which is tortious or even criminal, or that he has intended to inflict emotional distress, or even that his conduct has been characterized by 'malice,' or a degree of aggravation which would entitle the plaintiff to punitive damages for another tort. Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." Cochran v. Cochran, 65 Cal. App. 4th 488, 496 (1998)(citing Rest.2d Torts, § 46, com. d.).

Because the allegations neither identify any specific interactions between Defendants and Plaintiffs—the who, what, where— nor differentiate between Defendants, the Court cannot infer that any one of the Defendants had the requisite intent to inflict the emotional distress Plaintiffs allege. A reasonable inference that the statute of limitations would be tolled for this claim is similarly unavailable on the allegations presented. Accordingly, the Court GRANTS Defendants' Motion as to the intentional infliction of emotional distress claim and DISMISSES this claim WITH LEAVE TO AMEND.

F. Slander of Title

Defendants argue that Plaintiffs' slander of title claim is time barred and fails under Rule 12(b)(6) because Plaintiffs fail to allege that any of the documents on which they premise their claim—the Deed of Trust, NOD, Substitution and Assignment—are unprivileged publications. (Mot. at 28.)

In Sumner Hill Homeowners' Assn., Inc. v. Rio Mesa Holdings, LLC, the court explained that "slander or disparagement of title occurs when a person, without a privilege to do so, publishes a false statement that disparages title to property and causes the owner thereof some special pecuniary loss or damage." 205 Cal. App. 4th 999, 1030 (citing Fearon v. Fodera, 169 Cal. 370 (1915). The required elements of this tort are "(1) a publication, (2) without privilege or justification, (3) falsity, and (4) direct pecuniary loss." Id. (citing Truck Ins. Exchange v. Bennett, 53 Cal. App. 4th 75, 84 (1997); Howard v. Schaniel, 113 Cal. App. 3d 256, 263–264 (1980).The Complaint is insufficient to state a claim for relief that is plausible on its face for slander of title. Plaintiffs adequately allege the first three elements of their slander of title claim, but they do not plausibly connect Defendants' alleged tortious publications to the harm they allege.

Plaintiffs allege that Defendants effected a publication regarding their title to the subject property. Plaintiffs adequately allege that such publications were not privileged. In Gudger v. Manton, the California Supreme Court held that "a rival claimant of property is conditionally privileged to disparage or justified in disparaging another's property in land by an honest and good-faith assertion of an inconsistent legally protected interest in himself." 21 Cal. 2d 537, 545 (1943). The court, however, went on to say that an "express finding of lack of good faith, or of actual malice . . . would destroy the privilege or justification here discussed." Id. at 546. Taking Plaintiffs' allegations as true and drawing all reasonable inferences available in their favor, Plaintiffs adequately allege that Defendants' publications effected a slander of title and were unprivileged.

Indeed, Plaintiffs allege that Defendants published the foreclosing documents "with the malicious intent to injure Plaintiff[s] and deprive them of their exclusive right, title, and interest in the Property . . ." (Complaint ¶ 128.) Plaintiffs further allege that Defendants knew or should have known that such documents were improper at the time of execution. (Id. at ¶ 124.) Plaintiffs allege that they have "incurred expenses in order to clear title to the Property." (Id. at ¶ 126.) Plaintiffs also claim that these expenses were justifiable because the documents "were naturally and commonly to be interpreted as denying, disparaging, and casting doubt upon Plaintiffs' legal title to the property," and by publishing and recording such documents, "Defendants' disparagement of Plaintiffs' legal title was made to the public at large." (Id. at ¶ 124.) Still, Plaintiffs fail to adequately allege the damages they suffered as a result of the NOD. Since judicially noticeable documents indicate that the NOD was rescinded just short of nine months after it was recorded, Plaintiffs need to allege how the "humiliation, mental anguish, anxiety, depression, and emotional and physical distress, resulting in the loss of sleep," that they "continue[] to suffer . . . on an ongoing basis" is plausibly related to the erroneous NOD that was later rescinded. (Complaint ¶ 127.) For Plaintiffs to plausibly allege a cognizable injury that could be redressed by a favorable decision from this Court, they must allege how Defendants' intentional and tortious acts actually "deprive[d] them of their exclusive right, title, and interest in the Property . . ." (Id. at ¶ 128.) Plaintiffs do not adequately allege how Defendants' publications of the NOD (which was later rescinded), the Substitution or the Assignment caused a deprivation of Plaintiffs' possessory interest in the subject property. For Plaintiffs' alleged mental and emotional suffering to be actionable, Plaintiffs must provide more specific allegations for the Court to plausibly infer that this mental and emotional suffering was caused because Defendants failed to correct the NOD for nine months.

On these allegations, therefore, it does not appear Plaintiffs can state a claim for slander of title that gives rise to a right to relief. Accordingly, the Court GRANTS Defendants' Motion for Judgment on the Pleadings as to the slander of title claim, and DISMISSES this claim WITH LEAVE TO AMEND.

G. Quiet Title

Defendants argue that Plaintiffs' allegation that U.S. Bank is not the beneficiary under the Deed of Trust does not provide grounds for Plaintiffs to quiet title to the subject property because MERS had the authority to assign the Deed of Trust to U.S. Bank. (Mot. at 29.) Defendants further argue that Plaintiffs lack standing to challenge the transfer of their Loan because this is a "pre-foreclosure challenge to Defendants' ability to enforce the terms of the Loan." (Mot. at 30.) Since this is a pre-foreclosure challenge, Defendants maintain that even if the Assignment was not in conformance with the Pooling and Servicing Agreements for the trust, Plaintiffs must allege that the defect in the assignment renders the assignment void, rather than voidable. (Id.) Lastly, Defendants maintain that Plaintiffs' failure to repay or offer to repay the Loan is fatal to their claim to quiet title. (Id.)

The purpose of a quiet title action "is to finally settle and determine, as between the parties, all conflicting claims to the property in controversy, and to decree to each such interest or estate therein as he may be entitled to." Peterson v. Gibbs, 147 Cal. 1, 5 (1905). "[A] mortgagor of real property, cannot, without paying his debt, quiet his title against the mortgagee." Miller v. Provost, 26 Cal. App. 4th 1703, 1707 (1994). Indeed, "[t]he cloud upon [one's] title persists until the debt is paid." Aguilar v. Bocci, 39 Cal.App.3d 475, 477 (1974).Martinez v. Am.'s Wholesale Lender, No. C 09-05630 WHA, 2010 WL 934617, at *5 (N.D. Cal. Mar. 15, 2010), aff'd in part, rev'd in part, 446 F. App'x 940 (9th Cir. 2011).

A quiet title action must be in a verified complaint that includes: (1) a description of the property in question; (2) the title of the plaintiff as to which a determination is sought and the basis of the title; (3) the adverse claims to the title of the plaintiff against which a determination is sought; (4) that date as of which the determination is sought; and (5) a prayer for the determination of the title of the plaintiff against the adverse claims. Rosenfeld, 732 F. Supp. 2d at 974–975 (citing Cal.Code Civ. Proc. § 761.020).

In most circumstances, a requirement of an action to quiet title is an allegation that plaintiffs "are the rightful owners of the property, i.e. that they have satisfied their obligations under the deed of trust." See Kelley v. Mortg. Elec. Registration Sys., Inc., 642 F. Supp. 2d 1048, 1057 (N.D. Cal. 2009). Thus, it is normally dispositive as to this claim that, under California law, a borrower may not assert a quiet title action against a mortgagee without first paying the outstanding debt on the property. See Rosenfeld, 732 F. Supp. 2d at 975; see also Mehta v. Wells Fargo Bank, N.A., 737 F. Supp. 2d 1185, 1206 (S.D. Cal.2010) (dismissing quiet title cause of action for failure to allege tender). However, as discussed above, courts have refused to apply the tender requirement where plaintiff plausibly alleges that the defendant lacks authority to foreclose on the property and, thus, that any foreclosure sale would be void rather than merely voidable.

Plaintiffs allege that Defendants claim some right in their estate, which constitute a cloud on Plaintiffs' title to the property. (Complaint ¶ 134.) Plaintiffs seek to quiet title and a judicial declaration that the title to the subject property is vested in Plaintiffs alone to "forever enjoin[]

Defendants, their agents, and assigns" from asserting any right, interest, or claim to the subject property. (Id. at ¶ 138.) However, the allegations in the Complaint, the documents incorporated by reference, and the judicially noticeable Deed of Trust indicate that Plaintiffs' exclusive interest in title to the subject property is subordinate to the security interest in the property retained by WMC that was then transferred to U.S. Bank. While Plaintiffs allege that the beneficial interest in the DOT was improperly conveyed to U.S. Bank, they do not adequately allege they are entitled to an exclusive ownership interest in the subject property for purposes of quieting title. In other words, the Court cannot "forever enjoin" Defendants from asserting any right or interest to the subject property because this would trample on Defendants' contractual rights without a showing that Plaintiffs have satisfied their obligations under the loan.

While Plaintiffs need not demonstrate that they could tender the full amount of the loan to clear their title to the subject property of any fraudulent or void encumbrances, Plaintiffs must at the very least allege why the purported claims or interests in their property are adverse to their interest in the property. Since nothing in the Complaint allows the Court to infer that Plaintiffs' obligation under the loan was satisfied, Plaintiffs' right to this form of relief is too speculative as alleged. Accordingly, Defendants' Motion for Judgment on the Pleadings is GRANTED as to Plaintiffs' claim to quiet title. Plaintiffs' quiet title claim is therefore, DISMISSED WITH LEAVE TO AMEND.

H. Unfair Competition and Deceptive Trade Practices

As with the negligence claim, Defendants argue that Plaintiffs' UCL claim is time-barred because they filed their complaint more than four years after the Substitution, Assignment, and Notice of Default.[6] (Mot. at 17.) Additionally, Defendants assert that Plaintiffs lack standing to assert a claim under the UCL "because they have not suffered any economic injury caused by Defendants' alleged unfair competition," "as there are no pending foreclosure proceedings against the Property." (Mot. at 18; RJN, Ex. 2.) Lastly, Defendants maintain that Plaintiffs cannot allege that Defendants actions were "unlawful" or "unfair." (Mot. at 19.)

Plaintiffs allege that Defendants engaged in deceptive business practices by "[i]nstituting improper or premature foreclosure proceedings to generate unwarranted fees," "[e]xecuting and recording documents without legal authority to do so," "[f]ailing to disclose the principal for which documents were being executed and recorded in violation of California Civil Code Section 1095," "[f]ailing to record Powers of Attorney in connection with other recorded documents in violation of California Civil Code Section 2933," "[a]cting as beneficiaries and trustees without the legal authority to do so," "[f]ailing to give proper notice of a trustee's sale and the postponement of the sale pursuant to California Civil Code Sections 2924g and 2924h," "[f]ailing to comply with California Civil Code Section 2923.5," and "[m]isrepresnting the foreclosure status of properties to borrowers." (Complaint ¶ 65.) Plaintiffs maintain that

[6] "A claim under the UCL must notably be brought within four years." (Mot. at 17) (citing Cal. Bus. & Prof. Code § 17208.)

Defendants have been unjustly enriched "from their act of foreclosing on Plaintiffs' home when they had agreed not to do so . . ." (Id. at ¶ 69.)

Plaintiffs, therefore, allege that their mortgage note and/or Deed of Trust "have been unlawfully encumbered . . ." (Opp. at 4.) They seek injunctive relief as "Defendants' unfair, unlawful, and fraudulent business practices and false and misleading advertising present a continuing threat to members of the public in that other consumers will be defrauded into having their property improperly sold at foreclosure." (Complaint ¶ 73.) As to economic harm, Plaintiffs allege that these various defects in the Notices of Default, which were published and posted, created a cloud on Plaintiff's title. (See, e.g., Complaint ¶ 125.) As a result, Plaintiffs claim that they have incurred expenses and will continue to incur expenses in order to clear title to the subject property. (Id. at ¶¶ 125-26.) On those bases, the Court finds Plaintiffs sufficiently allege economic harm to establish standing to pursue their UCL claim. Plaintiffs allege that "foreclosure proceedings were initiated which put [the Patrons] interest in the property in jeopardy; this fact is sufficient to establish standing . . ." Barrionuevo v. Chase Bank, N.A., 885 F. Supp. 2d 964, 977 (N.D. Cal. 2012); see Saachi v. Mortgage Electronic Registration Systems, Inc., No. CV 11-1658 AHM CWX, 2011 WL 2533029, at *9 (C.D. Cal. June 24, 2011) (holding that plaintiffs sufficiently alleged UCL claim because they "specifically allege[d] injury in fact, including loss of equity in their home, costs and expenses related to protecting themselves, ... fees and costs, including, without limitation, attorneys' fees and costs.") (internal quotation marks omitted).

That said, Plaintiffs' UCL claims premised on fraudulent conduct must be pled with particularity under Rule 9(b). "A plaintiff alleging unfair business practices under [17200] must state with reasonable particularity the facts supporting the statutory elements of the violation." Khoury v. Maly's of California, Inc., 14 Cal. App. 4th 612, 619 (1993). Plaintiffs' Complaint fails to identify which Defendants caused Plaintiffs to pay such unwarranted fees. It similarly fails to indicate which specific documents misstated the principal amount due on the loan. What's more, the allegations do not allow the Court to infer whether a foreclosure sale actually happened or is impending. For Plaintiffs to adequately allege their UCL claim that is grounded in deceptive business practices, they must identify which Defendant misrepresented the foreclosure status of the subject property and when. The Court can neither determine whether the statute of limitations for this claim has lapsed nor discern the content of the alleged misrepresentations or their chronology for purposes of reasonably inferring causation. More allegations are required to plausibly infer that any one of the Defendants in this action engaged in deception that caused Plaintiffs to incur expenses to clear title to the subject property. As such, Defendants' Motion for Judgment on the Pleadings is GRANTED as to Plaintiffs' UCL claim. Plaintiffs' UCL claim is therefore, DISMISSED WITH LEAVE TO AMEND. Plaintiffs are directed to amend their Complaint to cure the pleading deficiencies diagnosed in this Order.

I. Declaratory Relief

Plaintiffs request a determination of the validity of the Trust Deeds as of the date the Notes were assigned without a concurrent assignation of the underlying Trust Deeds. (Complaint

¶ 147.) Defendants argue that Plaintiffs fail to state a claim for declaratory relief because none of their claims have merit. (Mot. at 31.) To have standing to challenge the commencement of a foreclosure based on an invalid assignment, a borrower must allege either that the assignment is void not voidable or that the she has suffered prejudice. Yvanova v. New Century Mortg. Corp., 62 Cal. 4th 919, 937–38 (2016) ("Though the borrower is not entitled to object to an assignment of the promissory note, he or she is obligated to pay the debt, or suffer loss of the security, only to a person or entity that has actually been assigned the debt."). Here, Plaintiffs do not adequately allege any concrete or imminent risk of future injury that is likely to occur as a result of the Assignment they allege was improper. As discussed above, MERS was an authorized agent of the original beneficiary, WMC so MERS had the authority to assign the DOT to U.S. Bank. NDEX, on the other hand, was not an authorized agent at the time the NOD was recorded in February of 2009, which would give Plaintiffs the right to declaratory relief had the NOD not been subsequently rescinded.

For these reasons, the Complaint fails to sufficiently allege that any foreclosure-related document or any instrument conveying rights or interests in the subject property or the Note would either invalidate a hypothetical pending foreclosure sale or that Plaintiffs were otherwise prejudiced by assigning the beneficial interest in the Note to U.S. Bank and substituting NDEX for Westwood. Accordingly, the Court cannot infer that declaratory relief would be warranted at this time. Plaintiffs must allege *why* the specific instrument or foreclosure document that they allege is void would effect a wrongful foreclosure or otherwise cause them prejudice by increasing their payments or impairing the value of their home. The Court cannot determine whether Plaintiffs would have standing to pursue the declaratory relief they request without more specific allegations connecting the legal violations they allege to some compensable damages (e.g., their loan payments increased) or economic harm (e.g., injury to the value of their home).

Accordingly, the Court GRANTS Defendants' Motion for Judgment on the Pleadings as to Plaintiffs' request for declaratory relief, and DISMISSES this claim WITH LEAVE TO AMEND.

IV. CONCLUSION

For the foregoing reasons, Defendants' Motion for Judgment on the Pleadings is GRANTED IN PART and DENIED IN PART. Specifically, Defendants' Motion is GRANTED as to all of Plaintiffs' claims except their claim against SPS for cancellation of the Loan Modification. Furthermore, Plaintiffs are GRANTED LEAVE TO AMEND on condition that they specifically identify the circumstances preventing them from becoming aware of Defendants' alleged wrongdoing, clearly allege whether a foreclosure or trustee's sale actually occurred, specify the documents on which they relied that contained misrepresentations regarding the principal amount due on their loan, and provide sufficient allegations for the Court to infer that there is a probability that any complained-of-injuries were caused by Defendants' alleged misconduct. Plaintiffs shall file their amended complaint by March 27, 2017.

IT IS SO ORDERED.